

The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.



Dated: June 24 2005

A handwritten signature in blue ink, appearing to read "Mary Ann Whipple".

Mary Ann Whipple  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION

In Re:	)	Case No. 05-32215
	)	
Timothy and Sherry DeLong,	)	Chapter 13
	)	
Debtors.	)	
	)	JUDGE MARY ANN WHIPPLE

**MEMORANDUM AND ORDER OVERRULING OBJECTION TO CONFIRMATION**

This case came before the court for hearing on confirmation of Debtor's Chapter 13 plan, as amended, on June 21, 2005, after being continued from May 17, 2005, at the request of Exchange Bank. Approximately two hours before the hearing, The Exchange Bank filed an objection to confirmation and a request for a continuance of the hearing. It did not alert the court to this filing and counsel for Exchange Bank did not appear at the hearing; however, a representative of Exchange Bank was present. For the reasons that follow, Exchange Bank's objection to confirmation will be overruled.

Debtors filed their Chapter 13 Plan on March 15, 2005. Fed. R. Bankr. P. 2002(b) requires that creditors be given not less than 25 days notice by mail of the time fixed for filing objections to a Chapter 13 plan. Notice in this case that objections to plan confirmation must be filed on or before May 10, 2005, or will otherwise be waived was sent to all creditors, including Exchange Bank, on March 24, 2005. [Doc. # 4]. Although sufficient

notice was provided, Exchange Bank did not file its objection to confirmation until June 21, 2005. Said objection is, therefore, overruled as being untimely filed.

Moreover, even if the objection was timely filed, the court overrules the objection on its merits. Exchange Bank objects to Debtors' Chapter 13 plan to the extent that it requires it to "release its third mortgage upon confirmation as being unsecured by value." [Doc. # 2, p.2]. At the hearing, Exchange Bank indicated that it had obtained an appraisal of real estate owned by Debtors and which, according to their bankruptcy petition and schedules, constitutes their primary residence, valuing the property at \$90,000. The Treasurer of Wood County, Ohio, has filed a proof of claim in the amount of \$3,624.13 for unpaid real estate taxes. It is undisputed that NovaStar Mortgage Inc. ("NovaStar") holds first and second mortgages on this property and has filed proofs of claim in this case in the amounts of \$70,495.74 and \$19,015.99.<sup>1</sup> These three claims total \$93,135.86. Debtors have not objected to these claims and indicated that they intend to object only to a few hundred dollars worth of post-petition fees included in the amounts set forth in the proofs of claim. It is also undisputed that Exchange Bank holds a mortgage that is junior to the real estate tax lien and the NovaStar mortgages. Exchange Bank filed a proof of claim in this case. But as a result of an earlier discharge entered Debtors' Chapter 7 case [case no. 04-39136], they now have no personal liability on Exchange Bank's debt.

The facts of this case are similar to that of *Lane v. Western Interstate Bancorp (In re Lane)*, 280 F.3d 663 (2002). In *Lane*, a junior mortgage holder whose lien on the debtors' home was wholly unsecured objected to confirmation of their Chapter 13 plan. Because the value of the debtors' home was less than the balance due on the first mortgage, the Chapter 13 plan proposed paying the junior mortgage holder only as an unsecured claimant. In overruling the junior mortgage holder's objection to the plan, the Sixth Circuit addressed the interplay between 11 U.S.C. §§ 506(a) and 1322(b)(2). *Id.* at 665-69.

Section 506(a) provides that "[a]n allowed claim of a creditor secured by a lien on property in which the estate has an interest ... is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim." Section 1322(b)(2) provides that a Chapter 13 plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence. . . ." The Sixth Circuit explained that whether a lien claimant is the holder of a 'secured

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<sup>1</sup> The court takes judicial notice of the contents of its case docket, the Debtors' schedules, and proofs of claim filed in this case. Fed. R. Bankr. P. 9017; Fed. R. Evid. 201(b)(2); *In re Calder*, 907 F.2d 953, 955 n.2 (10<sup>th</sup> Cir. 1990).

claim’ or an ‘unsecured claim’ depends on whether the claimant’s security interest has any actual value as determined under § 506(a). *Id.* at 669. “If a claimant’s lien on the debtor’s homestead has no value at all, . . . the claimant holds an ‘unsecured claim’ and the claimant’s contractual rights are subject to modification by the plan.” *Id.*

In this case, as in *Lane*, the lien of the junior lienholder, Exchange Bank, has no value since there is no equity in Debtors’ home to which its interest can attach. *See* 11 U.S.C. § 506(a). Thus, under § 1322, the contractual rights of Exchange Bank are subject to modification by Debtors’ Chapter 13 plan. Lacking secured status with respect to its claim, Debtors’ Chapter 13 plan may properly provide that Exchange Bank release its mortgage on their home. The court notes that the plan provides that the mortgage shall be treated as released upon confirmation. The court further finds, however, that while release of the Exchange Bank mortgage shall be effected by the confirmation order, release shall be further conditioned upon performance and completion of the plan and receipt of a Chapter 13 discharge. If Debtors voluntarily dismiss this case, or it is dismissed due to non-performance of the plan, then Debtors shall not be entitled to the benefits of strip down of the Exchange Bank third mortgage in accordance with the *Lane* case. *See* 11 U.S.C. § 349(b)(1)(C).

**THEREFORE**, for the foregoing reasons, good cause appearing,

**IT IS ORDERED** that the Exchange Bank’s request for continuance be, and hereby is, **DENIED as moot**; and

**IT IS FURTHER ORDERED** that Exchange Bank’s objection to confirmation be, and hereby is, **OVERRULED**, subject to the condition set forth above, which shall be treated as a supplement to and part of the order confirming Debtors’ Chapter 13 plan.